App. 333. In spite of the contrary intimation in the principal case, a written contract of sale can hardly be a representation that the vendor will not claim a lien in case of insolvency, thereby forming the basis for an estoppel; nor is such a contract a symbol of possession. In the absence of attornment by the bailee to the second purchaser, therefore, the principal case seems erroneous.

SUBROGATION — ASSIGNMENT OF MORTGAGE TO SUBSEQUENT LESSEE ON REDEMPTION. — The assignee of a first mortgage obtained a subsequent lien on the mortgaged land. The owner of a lease intervening between the mortgage and the lien made large improvements on the land. After the acquisition of the lien he brought a bill to compel the assignee of the mortgage to receive the debt and assign the mortgage. *Held*, that a decree will be granted. *Hopkins* v. *Ketterer*, 85 Atl. 421 (Pa.).

A lessee may redeem and be subrogated to the rights of a prior mortgagee, when the mortgagee's rights will not be jeopardized thereby. *Hamilton* v. *Dobbs*, 19 N. J. Eq. 227; *Wunderle* v. *Ellis*, 212 Pa. 618, 62 Atl. 106. *Cf. Snook* v. *Zentmyer*, 91 Md. 485, 46 Atl. 1008. The lessee's equity in protecting his lease and improvements is clear. In the principal case no rights of the defendant were infringed, for he could not utilize his prior mortgage for the benefit of his lien, even where tacking is allowed, since the lien was acquired with constructive notice of the recorded lease. *Toulmin* v. *Steere*, 3 Meriv. 210. Subsequently the mortgagee, to enforce his lien, may compel the lessee to foreclose; but the lessee can then sell subject to the lease, thus protecting his property right. The mortgagee's former rights as a lienholder against the reversion, effective only after the original mortgage claim and the lease are taken out of the whole estate, are still preserved. The lessee, however, has no legal right to an actual assignment of the mortgage. *Hamilton* v. *Dobbs*, *supra*. But *cf. Twombly* v. *Cassidy*, 82 N. Y. 155. The equitable subrogation is adequate to protect him, for if the mortgage on the title record is marked "Paid by lessee," purchasers would take with notice of his equitable rights. And if an assignment is compelled, the assignor might perhaps be made liable on implied warranties. *Cf. Waller* v. *Staples*, 107 Ia. 738, 77 N. W. 570; *Ross* v. *Terry*, 63 N. Y. 613. It would seem, therefore, that equity should not require an actual assignment.

SURETYSHIP — SURETY'S RIGHT OF SUBROGATION — RELATION OF DEPOSITORY'S SURETY TO STATE TREASURER'S SURETY. — A bank in which the state treasurer had deposited public money failed and the bank's surety was compelled to pay the loss. The surety claimed that the loan was illegal and that it should be subrogated to the rights of the state against the treasurer's surety. *Held*, that the surety for the bank is not entitled to relief. *United States Fidelity & Guaranty Co.* v. *Title Guaranty & Surety Co.*, 200 Fed. 443 (Dist. Ct., D. Md.).

By the weight of authority, officials in charge of public money are absolutely liable for its loss except when caused by the act of God or a public enemy, not because they are debtors but for reasons of policy. *Tillinghast* v. *Merrill*, 151 N. Y. 135, 45 N. E. 375; *Rose* v. *Douglass Township*, 52 Kan. 451, 34 Pac. 1046; *United States* v. *Thomas*, 15 Wall. (U. S.) 337. Some jurisdictions make exceptions by statutory construction. *State* v. *Gramm*, 7 Wyo. 329, 52 Pac. 533; *City of Livingston* v. *Woods*, 20 Mont. 91, 49 Pac. 437. Others flatly deny the necessity for such a stringent rule and impose only the limited liability of a trustee. *Wilson* v. *People*, 19 Colo. 199, 34 Pac. 944; *State* v. *Copeland*, 96 Tenn. 296, 34 S. W. 427. In the principal case, though the state might on any view have proceeded against the treasurer's surety, it does not follow that the depository's surety succeeded to that right. Since the bank actually received the money it was clearly the primary debtor, for the misconduct of the official

had nothing to do with the bank failure. It is only fair that the relation of the sureties should be determined by the liability of their principals, for that was the measure of their assumption. Thus the surety of an assignee of a lease stands in the relation of principal to the surety of the lessee although both are answerable for the assignee's default. *Bender* v. *George*, 92 Pa. St. 36. Likewise the surety of a deputy sheriff who has misappropriated money received in his official capacity, has a prior liability compared with that of the surety of the sheriff. *Brinson* v. *Thomas*, 2 Jones Eq. (N. C.) 414. The more general surety holds a position like that of a guarantor of a bill or note, whose liability is secondary to that of all the parties on the instrument although some of them are only sureties. *Phillips* v. *Plato*, 42 Hun (N. Y.) 189; *Longley* v. *Griggs*, 10 Pick. (Mass.) 121. A further analogy is found where a public official with a general surety is required to furnish another surety for some special duty, in which case the general surety is not answerable at all for defaults in the special duty. *Columbia County* v. *Massie*, 31 Or. 292, 48 Pac. 694; *County Board of Education* v. *Bateman*, 102 N. C. 52, 8 S. E. 882; *State* v. *Young*, 23 Minn. 551.

TORTS — NATURE OF TORT LIABILITY IN GENERAL — LIABILITY FOR BREACH OF STATUTORY DUTY. — A statute imposed upon railroads the duty of fencing their tracks in certain cases. The defendant railroad failed to maintain its fence properly with the result that the plaintiff's cattle escaped and were lost. *Held*, that the railroad company is liable. *Stanley* v. *Atchison, Topeka, & Santa Fé Ry. Co.*, 127 Pac. 620 (Kan.). See NOTES, p. 531.

TRUSTS — NATURE OF TRUST RELATION — A TRUST DISTINGUISHED FROM AN EQUITABLE CHARGE. — The defendant and others, in conveying certain realty, provided in the deeds that the grantee should maintain and support the defendant for life and should reserve a room and bedroom for the defendant's use for life. The grantee mortgaged the property to the plaintiff who had knowledge of the defendant's rights. The plaintiff foreclosed the mortgage and sought to dispossess the defendant. *Held*, that the defendant may retain his possession. *Wolfe* v. *Croft*, 11 East. L. Rep. 532 (Nova Scotia).

The nature of the defendant's rights should be determined from the intent as apparent in the deed. *Hill* v. *Bishop of London*, 1 Atk. 617; *King* v. *Denison*, 1 Ves. & B. 260. If the instruments manifested a desire on the part of the grantors to have the defendant maintained out of part of the profits of the land, there would seem to be no difficulty in creating a trust of the whole land for this purpose. But in the principal case, in spite of the fact that the provision for maintenance is coupled with another which can only be a trust, the above intent does not appear. The grantee is intended to take beneficially, subject merely to a duty to support the defendant out of any fund at all. This is an equitable charge. *King* v. *Denison, supra; Loder* v. *Hatfield*, 71 N. Y. 92. Rather than requiring any technical words to create such a charge, the courts have gone very far in implying an intent to create them. *Harris* v. *Fly*, 7 Paige (N. Y.) 421; *Crawford* v. *Severson*, 5 Gill (Md.) 443. They may be created by deed as well as by will. See POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1244. In the principal case the promise was made directly to the defendant. But in the ordinary case of deeds the doctrine seems in substance to permit a beneficiary to sue on a contract for his benefit. The grantee, by accepting the conveyance, impliedly promises to follow the directions and thereafter is personally liable to support the grantor, who has also an equitable lien on the land, as security for his personal claim. *Brown* v. *Knapp*, 79 N. Y. 136; *Loder* v. *Hatfield*, 71 N. Y. 92. Since the mortgagee took with notice of the defendant's rights, the court rightly held that they would not be extinguished.